

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
TERRY CRABTREE, JUDGE

DIVISION III

CA 05-1242

May 10, 2006

STEVE MORRIS AND POLLY MORRIS
APPELLANTS

APPEAL FROM THE POPE COUNTY
CIRCUIT COURT
[NO. CV-2004-189]

V.

JESSE RANDAL YOUNG AND
CHARLOTTE S. YOUNG

APPELLEES

HONORABLE GORDON WILLIAM
MCCAIN, JR.
JUDGE

AFFIRMED IN PART; REMANDED IN
PART

Appellants appeal from an order of quiet title in which the trial court found that appellees had established that a fence line separating their respective properties was the boundary by acquiescence. Appellants contend that the trial court's decision is not supported by the evidence and that the trial court's order is not sufficiently definite. We affirm on the first point and remand on the second.

Appellees Randy and Charlotte Young are the owners of two tracts of land in Pope County. They acquired one tract in 1993 and the other in 1997. Both tracts, consisting roughly of seventeen and one-half acres, were purchased from Mr. Young's parents. Mr. Young's parents had acquired the land from Mr. Young's paternal grandparents. Mr. Young's father was born on the land in 1924.

Appellants Steve and Polly Morris have owned ten acres of land that lies to the west of

appellees' property since 1976. They purchased the property from Truman and Iva Nell Duvall, who had bought the land in 1973 from Billy and Karen Sue Henry, who are Mr. Young's aunt and uncle. The Henry's had acquired this property in 1957 or 1958 from Mr. Young's maternal grandparents, who had purchased it in 1941 from Mr. Young's great-aunt and uncle.

The focus of this dispute is a wire fence that has run north and south along the parties' properties. The south end of the fence runs through a tree line where the wire is attached to trees instead of posts. At one place in the wooded area, the fence goes through the middle of a pond that is fed by a spring. In 2003, appellants had their land surveyed and found that the fence was not on the property line, but rather that it lay on their land some forty-one to forty-three feet to the west of the true boundary line. Appellants then began the construction of a fence on the boundary line shown by the survey. After several heated discussions with appellees, and after one of appellees' horses became entangled in appellants' fence, appellees filed this action for quiet title claiming that the fence was the boundary line by acquiescence. Appellees sought and obtained a temporary restraining order prohibiting appellants from continuing with the construction of the fence. Appellants counterclaimed in trespass for damages flowing from appellees' alleged removal of trees and damage to the spring. The trial of this matter was held on March 1, 2005.

Randy Young testified at the hearing that he was born in 1948 and had grown up on the property. He built a cabin there in 1988 where he and his wife spent the weekends, and he moved there on a full-time basis in 1994. He said that the fence had divided the lands now owned by him and appellants for as long as he could remember. His earliest recollection of the fence was at a picnic by the pond with his maternal grandmother when he was in the first grade. He said that when he purchased the property the fence was intact and that it was suitable for keeping cows in the pasture,

where he had also kept horses, mules, and donkeys. His father had run a dairy operation and had pastured cows there as well. Young said that he had occupied the land to the fence and had bush-hogged, mowed, and baled hay up to the fence.

Young testified that in 1994 he hired John Birkmyer to clean out the small trees and brush along the fence so that he could repair it. He said that he hired Birkmyer again in 1998 so that he could make further repairs to the fence. At this time, he replaced the old fence, except a two-hundred foot section that ran in the wood line. He started at the north end and connected the fence to the same corner post that had been used before, and he ran the fence wire south to the wood line and followed the old fence line down through the woods. Young said that the fence through the woods was remarkably straight. Young testified that before he began this work he spoke with appellants who were agreeable with what he proposed to do. He said that the fence had always been accepted as the boundary line and that there had never been any agreement, discussion, or dispute about it. On cross-examination, he agreed that he had offered to buy the disputed area. He said that he believed that he had already paid for the property but that he was willing to pay again to resolve the dispute.

Billy Henry, Mr. Young's uncle who had resided in Pope County for sixty-eight years and had owned the property now held by appellants, testified that the fence had been there when he owned the property. He said that the fence was considered the boundary. He had recently seen the fence, after Mr. Young had replaced and repaired it, and said that it was located in the exact same place as it had been before. Henry further testified that when he owned the property both he and the Youngs teamed up to make repairs to the fence on a number of occasions and that the pond was used by the owners on both sides of the fence to water livestock. He said that the fence was "tolerable

straight” and that it “zigzagged a little bit but it wasn’t off much.”

Appellant Polly Morris acknowledged in her testimony that there was an old fence line in the trees that was used to keep the cows in, but she said that it was not close to being in a straight line although she could not say how much it wavered. Ms. Morris took issue with Mr. Young’s testimony that the major repairs to the fence had occurred in 1998. She said instead that this work had been done in 2001 and that the fence line had remained undisturbed prior to that time. She said that there was never a dispute over ownership until 2003 when she had the survey done, which was prompted by Mr. Young’s having cleaned out the pond and downing trees during the repairs in 2001. She explained her two-year delay in taking any action as owing to the illness of her husband. She said that there was never an agreement as to the location of the fence. Ms. Morris also said that she had not maintained the fence over the years. She said that, when Mr. Young spoke to her about taking out dead trees along the fence line, she told him “You do what you want to on your side, don’t take a dead one off me.”

Kingston Campbell also testified on behalf of the appellants. Like appellees, he owned ten acres to the west of the Morrises and said that he was familiar with the fence in question. He had horses and said that he tried to keep the fence up as much as possible. Sometimes the wind would blow down a tree that the fence was attached to so he would repair it to keep his horses off the Young’s property. He said that the tree-line fence zigzagged some and did not run straight. When he first moved onto his property in April of 1984, he said that the fence was poorly maintained and that his horse and Mr. Young’s father’s cows would wander across breaks in the fence. He was not able to say whether the fence was put in the same location when Mr. Young dozed out the northern part.

Richard Davis, Ms. Morris's brother, testified that he was familiar with the fence. His children grew up playing in the woods there and he had worked on the fence. He said that the fence built by Mr. Young in either 2000 or 2001 was not placed back on the old fence line but was placed farther to the west.

In rebuttal, Mr. Young testified that Mr. Davis's testimony was not correct that the northern portion of the fence had been moved. He said that he used the same corner post that had been used before and ran the fence due south. Introduced into evidence was an aerial photograph taken in 2001. Mr. Young testified that it depicted the fence running through the center of the trees, as did an aerial photograph taken in 1954.

The trial court issued its decision in a letter opinion. The court found that the exhibits introduced by appellees regarding the historical location of the fence line depict a line sufficiently definite to overcome appellants' argument that the fence was not a recognizable boundary because it was "tree to tree." The court found that the utilization of trees for support of the fence in lieu of fence posts did not render the boundary line indefinite. The court found that the 2001 aerial photograph provided confirmation of a straight line running north and south that was consistent with the surrounding fence lines in the area. The court further found credible the testimony of Billy Henry that the fence had been in existence for sixty years in the same location and that the fence did not zigzag more than a foot either way.

The court further found appellant Polly Morris's testimony to be indicative of the parties' acquiescence in the fence as the boundary line when she told Mr. Young to take the trees off *your* side of the fence when contacted about the removal of dead trees. The court was also persuaded by her testimony and that of Mr. Campbell regarding the alleged zigzagging of the fence as neither

witness could say how much it wavered. The trial court also placed credence in Mr. Morris's testimony that the fence had been placed back in its original location, as well as that of Mr. Henry to the same effect. The trial court's findings were memorialized in an order dated August 8, 2005, from which this appeal is taken.

The principles that govern whether a boundary line has been established by acquiescence are well settled. Whenever adjoining landowners tacitly accept a fence line or other monument as the visible evidence of their dividing line and thus apparently consent to that line, it becomes the boundary by acquiescence. *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997). A boundary line by acquiescence is inferred from the landowners' conduct over many years so as to imply the existence of an agreement about the location of the boundary line. *Id.* We observed in *McWilliams v. Schmidt*, 76 Ark. App. 173, 181, 62 S.W.3d 898, 905 (2001):

As we stated in *Summers v. Dietsch*, 41 Ark. App. 52, 849 S.W.2d 3 (1993), boundaries are frequently found to exist at locations other than those shown by an accurate survey of the premises in question and may be affected by the concepts of acquiescence and adverse possession. A fence, by acquiescence, may become the accepted boundary even though it is contrary to the surveyed line. *Id.* When adjoining landowners silently acquiesce for many years in the location of a fence as the visible evidence of the division line and thus apparently consent to that line, the fence line becomes the boundary by acquiescence. *Id.* It is not required that there be an express agreement to treat a fence as a dividing line; such an agreement may be inferred by the actions of the parties. *Id.* Acquiescence need not occur over a specific length of time, although it must be for a long period of time. *Lamney v. Eckel*, 62 Ark. App. 208, 970 S.W.2d 307 (1998). A boundary line may be established by acquiescence whether or not it has been preceded by a dispute or uncertainty as to the boundary line. *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997). When a boundary line by acquiescence can be inferred from other facts presented in a particular case, a fence line, whatever its condition or location, is merely the visible means by which the acquiesced boundary line is located. *Id.* Whether a boundary line by

acquiescence exists is to be determined upon the evidence in each individual case. *Hedger Bros. Cement and Materials, Inc. v. Stump*, 69 Ark. App. 219, 10 S.W.3d 926 (2000).

Although boundary-line cases are reviewed de novo on appeal, we will affirm a trial court's finding of fact with regard to the location of a boundary line unless the finding is clearly erroneous. *Boyette v. Vogelpohl*, ___ Ark. App. ___, ___ S.W.3d ___ (Oct. 5, 2005). A finding is clearly erroneous when, although there is evidence to support it, we are left, after considering all of the evidence, with the definite and firm conviction that a mistake has been made. *Id.* In reviewing a trial court's findings of fact, we give due deference to the trial judge's superior position to determine the credibility of the witnesses. *Robertson v. Lees*, ___ Ark. App. ___, ___ S.W.3d ___ (June 30, 2004).

Appellants' argument on appeal is that the fence row went from tree to tree and was a fence of convenience used to keep livestock off their property. They argue that the testimony of Mr. Kingston Campbell revealed that the fence was in poor condition and was poorly maintained. Appellants also emphasize Mr. Young's attempt to purchase the disputed area. Appellants also insist that appellees failed to meet their burden of proof as to adverse possession. We find no merit in these arguments. The trial court found that the appellees had met their burden of showing that the fence line had been established as the boundary by acquiescence. The trial court found the testimony of appellees' witnesses more credible than those of the appellants. The testimony and evidence presented by appellees showed that the fence had been in existence for over sixty years and had been respected by the parties and their predecessors in title as the boundary line between the properties. In light of the law on this subject and the testimony presented, we are unable to say that the trial court's findings are clearly against the preponderance of the evidence, and we affirm.

Appellants further contend that the trial court's order is incomplete because it did not

describe the boundary line with sufficient specificity that it may be identified solely by reference to the decree, as is required by the law. *See Petrus v. The Nature Conservancy*, 330 Ark. 722, 957 S.W.2d 688 (1997); *Rice v. Whiting*, 248 Ark. 592, 452 S.W.2d 842 (1970). The trial court's decree incorporated and attached the survey commissioned by appellants that showed the "new" fence built by appellees, which the trial court found had been constructed along the old fence line. The new fence, however, did not run the entire length of the property, so the trial court ordered appellees to continue the construction of the fence in a southerly direction so as to intersect with the southern boundary point, a tree that had barbed wire embedded in its bark. We agree with appellants that the decree is not sufficiently specific and definite. Therefore, we remand for the legal description of the fence line, as reflected by the survey, to be incorporated into a decree. *Johnson v. Jones*, 64 Ark. App. 20, 977 S.W.2d 903 (1998); *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997).

Affirmed in part; remanded in part.

BIRD and GLOVER, JJ., agree.